Article

Direct Democracy and Campaigns Against Minorities

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INTRODUCTION

Direct popular voting on legislation, although rare in most established democracies, is the norm in several American states that make frequent use of the citizen initiative process.1 In all states, legislators may also refer constitutional amendments to voters for popular approval.2 Topics of popular initiatives and constitutional amendments span a wide range, but popular votes on matters of individual rights are one of the more unique and controversial aspects of American direct democracy.3 Americans are frequently asked to make decisions about rights afforded to various minority groups, and to cast

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3. E.g., id. at 19–45; cf. Eule, supra note 1, at 1503–90 (considering how courts should go about deciding challenges to the constitutionality of voter’s enactment as democracy becomes more direct). See generally Derrick A. Bell, The Referendum: Democracy’s Barrier to Racial Equality, 54 WASH. L. REV. 1 (1978) (explaining that the threat of direct democracy fueled with elected representatives underperforming causes voters to pursue a “do-it-yourself” method).
votes on policies that are associated with a clearly identifiable minority.\(^4\)

In this Article, I discuss why campaigns and voting on ballot measures associated with rights questions are unique when compared to campaigns and voting for candidates and other ballot measures. In Part I, I discuss how direct-democracy campaigns generally differ from candidate campaigns, and I propose that voter consideration of issues, and voter assessments of groups associated with an issue placed on the ballot, play a more prominent role in direct democracy than in candidate contests. One implication of this is that direct-democracy campaigns focus critical attention on minority groups associated with a policy issue. This means that voting based on stereotypes and negative affect toward a group may be far more pronounced in direct democracy than in other electoral contexts. In Part II, I argue that the unique context of direct-democracy campaigns against minorities also involves a politics of backlash, where legislative and judicial outcomes favoring minorities are targeted for repeal via referendum and initiative. Minority gains achieved in the legislative and judicial arenas can be repealed by an electoral majority that perceives a minority as a threat.\(^5\)

This sets the stage for a discussion of same-sex ballot measures in Part III. There, I provide a brief overview of ballot measures on the subject of lesbian and gay rights, and a description of how lesbian and gay rights and the courts are portrayed in direct-democracy campaigns. My overview of campaign ads illustrates that contemporary campaigns against the right to marry lack the explicit, overt animus of older direct-democracy campaigns against gay rights, but contemporary campaigns continue to make use of enduring stereotypes about the threat of homosexuality. Part IV of this Article explores what I call the spillover effects of direct-democracy campaigns against minorities. Specifically, campaigns against same-sex marriage in 2004 had the capacity to move popular opinion toward being less sympathetic to gays and lesbians as a group. I conclude with Part V, in which I discuss how we might generalize from campaigns against same-sex marriage to a broader understanding of the role of direct-democracy campaigns that

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5. *Cf.* Bell, *supra* note 3, at 2 (explaining how courts use existing constitutional principles to protect minority rights against majoritarian abuses).
attempt to define minority rights. I suggest that—even if courts were to resolve the same-sex marriage debate—without new restraints, the process of direct democracy will continue to facilitate a backlash against minority groups that are perceived as a threat to an electoral majority, and facilitate a backlash against democratic institutions that protect minority rights.

1. CAMPAIGNS FOR CANDIDATES COMPARED TO CAMPAIGNS ABOUT ISSUES

Campaigns and voter decision making on initiatives and referendums differ substantially from candidate contests in several important ways. Voter decisions in candidate contests are aided by a wide range of durable, directly accessible decision heuristics that precede any campaign (such as partisanship and incumbency). Voter decisions in candidate races are influenced by such factors, as well as by interest group endorsements, voter evaluations of candidate traits (such as competence, integrity, and reliability), and potentially by voter response to a candidate's position on a range of issues. Although single-issue voting in candidate contests may be relevant to some voters' decisions, voters demonstrate high levels of uncertainty about a candidate's issue positions, even in presidential elections.

6. See Angus Campbell et al., The American Voter Unabridged Edition 274 (1960) (noting that one's individual expression of partnership is associated with the individual's statement of voting behavior); see also Michael S. Lewis-Beck et al., The American Voter Revisited 149–50 (2008) (stating that voting for the same party in successive elections causes more fervent partisan commitment).


Any single issue associated with a campaign to elect a candidate is thus just one of many factors that influence choices over candidates, and any single issue will thus play a limited role in how candidate campaigns appeal to and affect voters.\textsuperscript{11} Although a simplification of reality, it is sound to assume that most voters approach candidate contests with pre-existing partisan leanings,\textsuperscript{12} and that many others decide based on retrospective evaluations of incumbent performance.\textsuperscript{13} There is limited scope, then, for candidate contests to be based predominately on judgments about a single issue, let alone a single issue associated with rights afforded to a minority group.\textsuperscript{14}

Direct democracy presents a markedly different context for decision making. As with candidate races, cues and heuristics are available and widely used by voters,\textsuperscript{15} but initiative and
referendum voting is less directly linked to partisanship and incumbency. Although incumbent elected officials may write ballot questions (this is the only route to the ballot for legislatively-referred constitutional amendments\textsuperscript{16}), incumbents’ positions and party endorsements are not listed on the ballot with referendum and initiative questions.\textsuperscript{17} Voting directly on a policy question is, by definition, a form of issue voting. Voters clearly do rely on their partisanship,\textsuperscript{18} and utilize multiple sources of information when deciding on ballot questions,\textsuperscript{19} but narrower forces associated with the single issue at hand are likely to be much more dominant in referendum voting than in candidate voting. At the very least, when we compare the broad range of factors that affect voters in candidate races, decisions on ballot questions occur in a context where a single issue carries (relatively) far more influence.\textsuperscript{20} By extension, initiatives and referendums that ask voters to make choices about minority rights also ask voters to evaluate members of the minority group that is the subject of the rights question.\textsuperscript{21} Referendums

\& TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING AND DIRECT DEMOCRACY 33 (1998) (stating that “with the use of heuristics in political reasoning, different cues might be relevant for different voters”).

\textsuperscript{16} See Legislatively-Referred Constitutional Amendment, BALLOTpedia, http://ballotpedia.org/wiki/index.php/Legislatively-referred_constitutional_amendment (last updated Nov. 3, 2011) (noting under legislatively-referred amendment, the amendment initiated by state’s legislature, like an incumbent elected official, can only be approved or rejected by the voters).

\textsuperscript{17} Elizabeth Garrett & Daniel A. Smith, Veiled Political Actors: The Real Threat to Campaign Disclosure Statutes 5 (Ctr. for the Study of Law and Politics, Working Paper No. 13, 2004) (“[D]irect democracy lacks one of the most powerful cues in candidate elections: party affiliation, a cue that appears on most general election ballots next to candidate names.”).


\textsuperscript{19} See generally Shaun Bowler & Todd Donovan, Do Voters Have a Cue? Television Advertisements as a Source of Information in Citizen-Initiated Referendum Campaigns, 41 EUR. J. POL. RES. 777, 777–93 (2002) (using the information sources they use in order to gauge the relative importance of various sources that voters rely upon in making voting decisions).

\textsuperscript{20} E.g., Single Issue Voting, RIGHT TO LIFE Mich., http://www.rtl.org/endorsements/singleissue_voting.html (last visited Apr. 2, 2013) (noting that the United States has a history of “voters who go to the polls to vote for a candidate or against another candidate based on a single issue”).

\textsuperscript{21} This point of linking decisions about an issue to the group that voters associate with the issue is developed in detail in Part II below.
on minority rights have the capacity to be largely about approving or disapproving members of a minority group.22

As noted above, voters faced with decisions on referendums and initiatives have access to useful cues that may simplify their decision making, but they are also exposed to information about the issue they are deciding on, and information about groups that may be affected by the proposal.23 Indeed, awareness of which group is affected by a policy may itself be a heuristic that voters use when deciding on a proposal.24 Cues in this context come in two overlapping forms: one associated with liking or disliking a group, and another associated with “what is after all the most vital political information: Who and what one is for or against.”25 The latter may be used by voters as a shortcut to figure out how to agree with opinion leaders or groups they trust, and thus how to vote with their underlying preference on the matter in mind.26 On the other hand, attitudes about the group affected by a policy allow voters a means to reason about the policy. Knowing that a group that the voter likes will benefit from a policy outcome may lead the voter to support action that produces that outcome.27 Conversely, a voter may oppose something if she believes that a group she does not like stands to benefit.28

Information about policy questions on the ballot (and, frequently, the group affected by the question) is available from the official title and summary the ballot that describes the question.29 In many states, voters also receive a government-
funded voter’s handbook that describes the issue, with arguments for and against, which voters often rely upon. As much as campaigns may have incentives to obfuscate and distort, it is difficult to mount a campaign supporting or opposing a referendum without addressing the substance of the issue on the ballot or without addressing the groups that benefit from or are harmed by the proposal. Although many ballot-measure campaigns are low-budget affairs, initiative campaigns have spent more on TV ads than presidential campaigns in some states. Even when ballot measures have lower levels of spending, the presence of a referendum on a state ballot can draw more media attention to the issue than would have otherwise been the case.

There are likely several ways that voters might reason about a ballot issue, and thus several potential methods that campaigns might use to appeal to voters. Rational voters may require information about how a proposal advances themselves, their group, or their partisan interest. Voters concerned with wider social effects of a policy may require information about broader consequences of adopting the policy. Each of these models of reasoning presumes that voters are at least modestly

questions_12/message12.htm (last visited Apr. 2, 2013) (explaining that each ballot question will have additional information to help voters).


31. E.g., Bowler & Donovan, supra note 19, at 781 (finding that 73% of voter guides are provided by the state); see BOWLER & DONOVAN, supra note 15, at 58 (exploring what elements of the handbook the voters find useful).

32. E.g., Todd Donovan et al., Contending Players and Strategies: Opposition Advantages in Initiative Campaigns, in BOWLER, DONOVAN & TOLBERT, supra note 26, at 93–94 (noting that one of California’s most celebrated initiatives was an “anti-illegal immigrant Proposition,” in which proponents only spent $800,000).

33. Cf. TODD DONOVAN ET AL., STATE & LOCAL POLITICS: INSTITUTIONS & REFORM 102 (2011) (“High levels of spending on initiative TV ads probably increase public awareness of initiatives and may increase public attention to campaign issues.” (footnote omitted)).

34. See, e.g., Todd Donovan et al., Priming Presidential Votes by Direct Democracy, 70 J. POL. 1217, 1220 (2008) (comparing media attention surrounding gay marriage, on whether gay marriage was an initiative on a state’s ballot).

35. See generally ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (discussing utility maximization of rational voters).

sophisticated, have some minimal level of conceptual and cognitive capacities, and are sufficiently motivated. In a world dominated by self-interested voters, campaigns would have incentives to provide voters with information about “what’s in it for them.” In a world dominated by voters with broader social concerns, campaigns would have incentives to provide information about broad outcomes associated with policy adoption.

Alternatively, a ballot issue may tap into values, beliefs, and stereotypes that are “so ingrained over a long period that [they] structure[] voters’ ‘gut responses’” and require no conceptual sophistication. Decision making on issues that affect a clearly identifiable group, moreover, may be structured by positive or negative affect for the group. Different types of ballot issues may elicit different types of reasoning, and any particular issue may find different voters reasoning in terms of self-interest, or social concerns, or gut values. Self-interest may be at the forefront for more voters when reasoning about tax measures, for example, but many voters likely also decide on tax matters in terms of broader social, normative, and ideological concerns.

Societal concerns, conversely, may be relatively more dominant on votes over governance, smoking regulations, drugs policy, or assisted suicide; but values, self-interest, ideology, and other forces would also be relevant to voter decisions on such matters.

37. Id. at 131 (noting that middle class voters oppose social welfare policies because they gain no benefit).
38. E.g., id. at 132 (explaining that citizens concerned about economic effects of voting would want to have that information).
40. E.g., SNIDERMAN ET AL., supra note 24, at 46 (stating that supporting rights of a person with AIDS stems from some people’s supportive nature to the gay community).
41. See generally BOWLER & DONOVAN, supra note 15, at 85–106 (examining the motivations of voters in elections that are focused primarily on tax and spending initiatives).
42. See id. at 105 (arguing that self-interested motivations do not necessarily supersede one’s “symbolic or ideological determinants of the vote”).
43. E.g., id. (suggesting that the policy content of the ballot issues is relevant to determine how voters may vote, which may not be based in self-interest).
44. See id. (asserting that based on the policy content, one may vote based on “symbolic themes” or ideology).
II. POLITICS OF BACKLASH: THE UNIQUE CONTEXT OF POPULAR VOTES ON MINORITY RIGHTS

Ballot questions about matters of minority rights present a unique decision context for voters. Clearly, voters will evaluate rights questions in terms of partisan cues, political ideology, broad social concerns, and normative concerns about procedural fairness. Some, particularly those in the affected minority, could approach the issue in terms of personal self-interest. Yet direct economic self-interest may be less relevant to a majority of voters on questions of minority rights than on questions about taxation and government spending. With ballot questions on matters whose direct effects of the policy fall on a clearly identifiable and often unpopular minority—such as voting on the rights of foreigners to own property, school desegregation, employment of immigrants, language policy, access to fair housing, access to public services for illegal immigrants, protections against discrimination based on sexual orientation, and related topics—the material costs and benefits that affect many individuals in the majority may be trivial, or ethereal.

The distribution of costs and benefits of such policies is different than that associated with other ballot questions. As a result, economic self-interest may play less of a role in voting

45. See Branton, supra note 18, at 372 (stating that studies indicate that a voter’s partisan affiliation is consistent with individual voting behaviors on ballot issues).

46. See id. (finding that “ideology is associated with voting behavior in approximately 44 percent of the models”).

47. See generally Tom R. Tyler, Social Justice: Outcomes and Procedures, 35 INT’L J. PSYCHOL. 117 (2000) (finding that a review of research demonstrates that people are more willing to accept decisions when they feel that those decisions are made through decision-making procedures they view as fair).

48. Analysis of survey data demonstrates that whites, Latinos, Asians, and African Americans have similar preferences over most ballot measures, but minorities vote differently than whites (and are more likely to oppose) ballot measures that affect minorities adversely. See generally Zoltan L. Hajnal et al., Minorities and Direct Legislation: Evidence from California Proposition Elections, 64 J. POL. 154, 154–77 (2002).

49. Cf. BOWLER & DONOVAN, supra note 15, at 89 (arguing that it might be easier for a voter to perceive self-interest produced by policies that are tangible, like those concerning fiscal issues).

50. See id. at 167 (stating that voters on policy issues concerning minorities are “uncaring” and “unthinking”).

51. Cf. Todd Donovan et al., Contending Players and Strategies: Opposition Advantages in Initiative Campaign, in BOWLER, DONOVAN & TOLBERT, supra note 26, at 81 (examining the success of passing policies that are broad or narrow in effect).
on rights. With questions of minority rights, regardless of the outcome of the vote, a majority of voters stand to gain (or lose) very little in the way of material benefits. Conversely, tangible costs are targeted to a relatively small minority. As an example, a policy proposal to prevent a few non-citizens from owning land may extend minor economic opportunities to some voters in the majority by marginally decreasing demand for (and thus cost of) property, but the only immediate economic effect is to exclude members of a small minority from ownership. Likewise, barring illegal immigrants from receiving public services can have very marginal economic effects for a majority by reducing the total costs of providing public services paid by voters (taxpayers) in the majority, but the consequences for the smaller (non-voting, non-citizen) immigrant minority are more material, and immediate. In sum, the economic benefits of policies constraining minority rights are so widely diffused across the majority that they may be trivial to individual majority voters, and largely invisible.

There are examples of referendum voting where self-interested economic voting is grounded in objective factors that affect many voters. Public employees were found to be more likely to oppose a property-tax-cutting measure that would have reduced public-sector funding, whereas people paying higher property taxes were more likely to support it. Likewise, people with children in private schools were more supportive of a school-voucher proposal. These results are consistent with the idea that on fiscal matters voters connect their personal, objective economic situation to support for ballot measures that advance their personal economic interest. Although subjective perceptions of economic self-interest may be in play as a mode of reasoning for some voters when considering questions on minority rights, it is difficult to conceive of a large group of voters who would foresee tangible economic benefits from something like defining marriage as a union only between a man and a woman. Campaigns on such matters will thus need to find oth-

52. This would assume that other public sector expenditures would not increase as a result of excluding illegal immigrants from access to public services such as education.
53. See, e.g., BOWLER & DONOVAN, supra note 15, at 103 n.13 (using Proposition 13 to exemplify that support for the initiative with response to property tax burden).
54. See id. at 94.
55. E.g., id. at 129 (examining voters' motivations based on a proposition's immediate effect on the person's income).
er ways to convince voters they should be concerned about a minority's rights.

Further, the campaign and decision-making context surrounding initiatives and referendums on minority rights have involved instances where legislative or judicial outcomes that favored a minority have altered a previous majority-supported status quo. Racial and ethnic minorities have made gains (in terms of rights protections and policies that advantage racial and ethnic minorities) through courts and representative institutions, particularly since the Voting Rights Act succeeded in increasing minority representation in state legislatures. Yet as legislative bodies have become more representative of racial and ethnic minorities, "the electoral majority is reasserting its power by undercutting and constraining the power of representative government." Bruce Cain named this backlash phenomena "The New Populism," an expression of the concerns of "white middle and working classes" voters that constrains—by referendum, recall, and citizen-initiated constitutional amendment—the scope of what legislatures (and courts) may do. I would add to this list the use of judicial retention elections to threaten or remove state supreme-court justices who make rulings that are unpopular, as was the case in Iowa after that state's court unanimously upheld a lower-court ruling that al-

56. See Bell, supra note 3, at 2 (asserting that courts use existing constitutional principles to protect minority rights against majoritarian abuses).
59. Id. at 273–74. Cain was concerned with the weakening of representative institutions generally, and the broad consequences of this for weaker minority influence over any policy. Although not noted by Cain, the populist backlash is particularly acute with rights questions, and the institutions of direct democracy may also weaken the court's ability to protect minority interests. See id. at 275; see also Julian N. Eule, Crocodiles in the Bathtub: State Courts, Voter Initiative, and the Threat of Electoral Reprisal, 65 U. COLO. L. REV. 733, 733–40 (1994) (arguing that judicial protection is imperative when voters are motivated by popular passion or prejudice).
60. Cain, supra note 58, at 274.
ollowed same-sex marriage in that state. In 2010, Iowa voters voted out all three of the state supreme court justices who were up for retention.

A number of anti-minority referendums and initiatives provide examples of popular backlash against minority gains achieved via legislatures and courts. Legislators extended protections against race-based housing discrimination, and by doing so, precipitated a popular initiative that repealed the gains that minorities had achieved in the legislature. Elected representatives authorized affirmative-action programs to aid minorities in education and job opportunities, thus triggering initiatives that repealed those policies. Local councils extended anti-discrimination protections to account for discrimination based on sexual orientation, leading to local referendums and

61. Varnum v. Brien, 763 N.W.2d 862, 904 (Iowa 2009) (concluding that the offered governmental objective is not substantial, and that equal protection clause would require more).


65. In 1978, voters in Eugene, Oregon, repealed a local anti-
state-wide initiatives and referendums designed to repeal such policies. Same-sex marriage legalized by state legislators was repealed by referendum. Court-mandated school integration produced voter-initiated laws preventing “forced busing” in three states. Judicial rulings on same-sex marriage have likewise precipitated legislative-referred constitutional amendments and constitutional initiatives designed to return policy to a previous majority-supported status quo.


70. Proposition 8 in California (2008), a popular initiative, can be seen as a response to the state supreme court ruling in In re Marriage Cases, 43 Cal. 4th 757 (Cal. 2008), which held an anti-same-sex marriage statute unconstitutional. See Prop 8: Arguments and Rebuttals, CALI. GEN. ELECTION (2008), http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop8-title-sum.htm (“Because four activist judges in San Francisco wrongly overturned the peo...
The populist backlash associated with many of these rights contests mean that direct-democracy campaigns over questions of minority rights are not simply about a particular right and a particular minority group, but may also reflect a reaction to counter-majoritarian aspects of democracy that are facilitated by courts and representative government. This means that rights questions that reach the ballot are frequently also questions about redefining state constitutions to constrain democratic procedures that produced gains for minorities in the form of legislative policies or rights protections.

Given this unique context for voter reasoning, compared to other measures that reach the ballot, direct-democracy campaigns offer more room for voting on rights questions to be based on animus, negative group affect, negative stereotypes about the targeted group, and animus toward general counter-majoritarian elements of democracy. Campaigns seeking to constrain minority rights thus have incentives to (explicitly or implicitly) provide information that highlights (or generates) animus toward the targeted group. Campaigns also have incentives to appeal to negative stereotypes about the targeted group, and to highlight (and attack) counter-majoritarian elements of democratic institutions. The muted role of economic self-interest and the prominent role of group affect in decision making on these matters makes it, in a sense, rational for campaigns seeking to constrain minority rights to use irrational appeals to fear, and to highlight threats presented by the minority made subject of the ballot question.

One enduring critique of direct democracy is that the process allows a majority of voters’ fears and prejudices to be expressed in policies that target minorities and restrict minority rights. Majority fear of and animosity toward minorities is a problem not simply for direct democracy, but for democracy generally. Classic studies of popular attitudes have established that the public’s initial response to questions about “out

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71. See supra text accompanying notes 8–44 comparing direct-democracy campaigns to candidate elections.

72. See Bell, supra note 3, at 13–22 (discussing the threat direct democracy initiatives pose to racial and other discrete minorities); Linde, supra note 2, at 21 (expressing concern that “if a state permits lawmaking by statewide initiatives, their legitimate use must exclude measures for motives that the designers of republican government most feared”).

groups” is almost universally intolerant. Moreover, white voters’ racial attitudes and racial animus have been shown to affect how they vote in candidate contests. But my argument (which is by no means original) is that the role of anti-minority sentiments may be amplified by direct democracy, and that such sentiments will frequently cause minority rights to be defeated at the ballot box. Barbara S. Gamble demonstrated that initiatives targeting the civil rights of minorities passed at a much higher rate than initiatives on all other subjects. Donald P. Haider-Markel and his colleagues also showed that gays and lesbians lost more often than they won when questions about their rights were decided by a public vote. Caroline J. Tolbert and Rodney E. Hero contend that the popularity of initiatives targeting minorities can be explained in terms of the threat that a diverse racial/ethnic context poses to white voters.

73. See, e.g., SAMUEL A. STOUFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES 26–48 (1955) (showing that, compared to the views of community leaders, the general public is usually much less tolerant of nonconformists, such as socialists and atheists).

74. See MENDELBerg, supra note 14, at 169-90 (showing the impact of implicit racial messages on voting patterns); KEITH REEVES, VOTING HOPES OR FEARS? 25–42 (1997) (citing studies that show a significant portion of white voters harbor negative attitudes toward black candidates); PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 88–109 (1993) (showing a correlation between negative racial stereotypes and opposition to race-conscious initiatives such as fair housing or affirmative action).

75. See Bell, supra note 3, at 2 (“[T]he growing reliance on the referendum and initiative . . . creates a crisis for the rights of racial and other discrete minorities.”); Linde, supra note 2, at 22–39 (tracing the history of direct democracy in the United States and its impact on minority rights). But see Todd Donovan & Shaun Bowler, Direct Democracy and Minority Rights: An Extension, 42 AM. J. POL. SCI. 1020, 1022 (1998) (showing that prior to the debate over marriage, voters, particularly those in larger jurisdictions, were often supportive of gay rights measures, and that direct democracy is not per se abusive of minorities). Haider-Markel et al. show that anti-gay outcomes became more common when marriage rights began being the subject of popular votes. See Donald P. Haider-Markel et al., Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights, 60 POL. RES. Q. 304, 307–11 (2007).

76. Gamble, supra note 65, at 258.

77. See Haider-Markel et al., supra note 75, at 307 (finding that the pro-gay outcome in direct democracy contests was only 39%). It should be noted that Haider-Markel et al. also found that gays and lesbians lost regularly when their interests were decided in legislative votes. Id.

78. Caroline J. Tolbert & Rodney E. Hero, A Racial/Ethnic Diversity Interpretation of Politics and Policy in the States of the U.S., 40 AM. J. POL. SCI. 851, 867 (1996) (arguing that consensuses develop in homogeneous states, but that “[w]here a predominant white . . . population coexists with substantial white ethnic and/or minority populations, social pluralism tends to increase
In sum, previous election results suggest that voters have not been sympathetic to minority rights and interests when questions affecting those issues were placed on ballots.\textsuperscript{79} Indeed, knowledge of popular anti-minority sentiments may be one reason why elites use direct democracy to set policy. Examples of voter-approved ballot initiatives that restrict minority rights or target minorities for differential treatment are numerous. Early in the twentieth century, Oklahomans approved an initiative that stripped voting rights from African Americans.\textsuperscript{80} Californians voted to prohibit Asians from owning land,\textsuperscript{81} and Arizonans passed an initiative that prohibited employment of immigrants.\textsuperscript{82} Since the 1960s, initiatives and referendums have been used to legislate on matters such as race-neutral access to public accommodations, access to fair housing, school desegregation, and protections against discrimination in employment based on sexual orientation.\textsuperscript{83} Californians approved initiatives repealing fair access to housing.\textsuperscript{84} Voters in Arizona and other states made English an “official” language,\textsuperscript{85} and Colorado passed an initiative that prohibited extending antidiscrimination protections to gays and lesbians,\textsuperscript{86} while voters in multiple states approved initiatives repealing applications of affirmative action when based on criteria of race and ethnicity.\textsuperscript{87}
III. MARRIAGE ON THE BALLOT

Courts have effectively closed the door for citizen legislation on several of the minority-rights questions that previously appeared on state and local ballots. Procedures that allowed (or required) referendums on matters of fair housing, as well as law produced by referendums or initiative that repealed protections from racial discrimination, and initiated law that prohibited school integration, have been found unconstitutional on equal-protection grounds. By the 1980s and 1990s, the matters of minority rights found most frequently on ballots involved attempts to repeal, prevent, or (far less commonly) advance laws that protected people against discrimination based on sexual orientation. Between 1972 and 1996, at least 90 measures dealing with civil rights of gays and lesbians appeared on state and local ballots. Many of these were “no special rights” measures designed to permit discrimination (in


89. See Reitman v. Mulkey, 387 U.S. 369, 386–87 (1967) (upholding a state-court decision that found California’s constitutional initiative repealing a fair-housing statute unconstitutional under the equal protection clause of the Fourteenth Amendment). But see Spaulding v. Blair, 403 F.2d 862, 865 (4th Cir. 1968) (holding that submission of an open-housing act to the electorate for rejection or approval via referendum did not deny equal protection).

90. See Washington v. Seattle School District No. 1, 458 U.S. 457, 486–87 (1982) (finding that a statewide initiative to end Seattle’s mandatory school busing program unconstitutional because it was approved for racially motivated reasons).

91. See Gamble, supra note 65, at 245 (“Recently, ballot initiatives that seek to bar governments from passing laws that prohibit discrimination on the basis of sexual orientation have occupied a prominent place among the issues that have reached the ballot.”). In compiling various minority rights initiatives, Gamble found many more dealing with gay rights than other issues. See id. at 263–65.


employment) based on sexual orientation, but the list also includes a handful of measures dealing with AIDS. None of these measures directly addressed the issue of marriage. When the U.S. Supreme Court determined that Colorado's citizen-initiated prohibition against protecting people from discrimination based on sexual orientation amounted to a denial equal protection in *Romer v. Evans*, initiatives and referendums about sexual orientation discrimination largely disappeared from ballots.

As a political matter, where earlier federal-court decisions ended cycles of direct legislation on questions about minority rights, *Romer* only altered the policy goals of political organizations opposed to gay rights—it did not prevent them from continuing to use the ballot to regulate the rights of gays and lesbians. *Romer*, and a state-court ruling on same-sex marriage in Hawaii, corresponded with the ongoing qualification of several ballot measures that would amend state constitutions to define marriage as a union between opposite-sex couples only. Voters in Hawaii amended their state's constitution in 1998 in response to a court ruling that questioned whether marriage could be reserved for opposite-sex couples given the equal pro-

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94. For a partial summary of ballot measures involving gay and lesbian rights, see Gamble, supra note 65, at 263–65; see also HAIDER-MARKEL, supra note 92, at 359–63; ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES 17–106, 127–32 (Stephanie L. Witt & Suzanne McCorkle eds., 1997); Donovan & Bowler, supra note 75, at 1020–24.

95. See HAIDER-MARKEL, supra note 92, at 359–63. It is worth noting that few of the state-level “Defense of Marriage Act” (DOMA) statutes adopted in rapid succession in the 1990s and early 2000s were the result of the popular initiative process. For an overview of these statutes, see Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Law, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx#2 (last updated Nov. 2012).

96. *Romer v. Evans*, 517 U.S. 620 (1996). The court ruled that antidiscrimination laws did not extend “special rights” and that Colorado’s Amendment 2 was motivated by animus toward gays and lesbians, rather than a rational relationship to any legitimate function of government. Id. at 631–33.

97. See HAIDER-MARKEL, supra note 92, at 636 (showing a lack of ballot initiatives in 1997).

98. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that same-sex marriage is not a fundamental right under the Hawaii constitution, but that statutes restricting it to male-female marriage must be subject to strict scrutiny); see also *Baehr v. Mike*, 910 P.2d 112 (Haw. 1996) (denying church and clergy members’ request to intervene; holding that their right to solemnize only marriages that fit their beliefs would not be infringed if same-sex marriage was allowed).
tection clause of that state’s constitution. Voters in Alaska approved a constitutional amendment banning same-sex marriage that same year. By the late 1990s, social conservative groups shifted emphasis from anti-discrimination laws to marriage and adoption laws. Focus on the Family mobilized contributors in 1999 by emphasizing the threat of gay and lesbian adoption, and the danger of teaching of same-sex marriage and tolerance of gay and lesbian clubs in public schools.

Same-sex marriage as a ballot issue gained added momentum in 2003 after the Supreme Court of Massachusetts directed the state to issue marriage licenses to same-sex couples. A national coalition of religious conservative groups, including Focus on the Family and the Family Research Council, formed in early 2004 “to defend traditional marriage in the wake of a court decision requiring marriage or marriage-type rights for homosexual couples.” Conservative activists qualified antigay marriage initiatives in six states (Arkansas, Montana, Michigan, North Dakota, Ohio, and Oregon) and state legislators placed constitutional amendments barring same-sex marriage on the ballot in seven others in 2004 (Georgia, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, and Utah). Eleven of these votes occurred in conjunction with the November 2 presidential election. Every measure was approved, usually with large super-majorities in support.

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100. Alaska’s Marriage Amendment (Measure 2) was approved with 68% support. Election Summary Report, ST. ALASKA DIVISION ELECTIONS (Dec. 1, 1998), http://www.elections.alaska.gov/results/98GENR/results.htm.

101. See Todd Donovan et al., Direct Democracy and Gay Rights Initiatives After Romer, in THE POLITICS OF GAY RIGHTS 161, 169 (Craig A. Rimmerman et al. eds., 2000) (discussing how antigay activists began to move to more incremental policy proposals that could be marketed as maintaining the status quo).

102. Id. at 180.


106. Only Louisiana’s and Missouri’s votes occurred in earlier primary
In 2004, most campaigns against same-sex marriage were low-budget operations, yet they nonetheless had the capacity to contact many voters.\(^\text{108}\) Campaigns against same-sex marriage collected signatures in and out of churches, and used grassroots volunteers and churches to distribute campaign literature.\(^\text{109}\) The Ohio Campaign to Protect Marriage began collecting signatures in May 2004, submitting 575,000 signatures by August 2004.\(^\text{110}\) In Michigan, Citizens for the Protection of Marriage sponsored a petition drive to place a constitutional amendment on that state’s November 2004 ballot and distributed one million fliers in support of it.\(^\text{111}\) In Oregon, the Defense of Marriage Coalition and the Oregon Family Council began collecting signatures in late May 2004. The Coalition collected 244,000 signatures to qualify the Oregon amendment by July.\(^\text{112}\)

Contacts with voters were not limited to petitioning. The Ohio campaign placed over 3.3 million phone calls (in a state where 5.6 million citizens cast votes) featuring Ohio’s Republican Secretary of State (who co-chaired Bush’s state election campaign) to promote Issue 1.\(^\text{113}\) The Arkansas “Yes on Amendment 3” campaign gathered 200,000 signatures and led a powerful church-based campaign.\(^\text{114}\) The *Detroit Free Press* reported that African-American voters in Michigan received thousands of “robo calls” urging them to vote for John Kerry in order to promote the Democrats’ goal of defending gay mar-

elections. *See id.* at 5 n.2.

107. States voting in November included Arkansas (Amendment 3, 75% yes), Georgia (Question 1, 76% yes), Kentucky (75% yes), Michigan (Proposal 2, 59% yes), Mississippi (Amendment 1, 86% yes), Montana (Measure CI—96, 67% yes), North Dakota (73% yes), Oklahoma (Question 711, 76% yes), Ohio (Issue 1, 62% yes), Oregon (Measure 36, 57% yes), and Utah (66% yes). Louisiana approved a ban on same-sex marriage at the September 18 primary (Amendment 1, 78% yes), while Missouri approved a Marriage Definition Amendment at the August 3 primary (71% yes). *Id.*

108. *Id.* at 6.

109. *Id.*

110. *Id.*


riage. Proponents of the 2004 Michigan marriage ban spent nearly $2 million on their campaign, with the Catholic Church and the Family Research Council providing most of the funding.

Most campaigns in 2004 featured very little spending by supporters or opponents of same-sex marriage, with nine of thirteen states that year having less than $100,000 in total spending. Total spending by groups opposed to and supporting same-sex marriage in most states in 2004 amounted to less than twelve cents per member of the voting-age population. This low value likely reflects that campaigns in favor of marriage bans were conducted via churches, and that opponents of same-sex marriage bans failed to mount substantial opposition campaigns in 2004.

No single election year since 2004 has included as many state-wide votes on same-sex marriage, but two additional votes were held in 2005, nine more in 2006, three states voted on marriage in 2008, two in 2009, and five voted on marriage in

115. “When you vote this Tuesday, remember to legalize gay marriage by supporting John Kerry,’ the call said. ‘It's what we all want. It's a basic Democratic principle.” Kathleen Gray, Presidential Campaigns, Voters Upset About Misleading Calls, DETROIT FREE PRESS, Nov. 1, 2004 (on file with author).


120. In 2004, Oregon ($5,368,452 total spending, or $1.96 per citizen over 18 years old), was an exception to this. A modest campaign against bans on same-sex marriage in 2004 also occurred in Utah (where opponents spent $0.47 per citizen over 18). For data behind these calculations, see O'CONNELL, supra note 117, and McDonald, supra note 118.
By 2006, several state-level campaigns over gay marriage had far more funding from individual contributions on both sides than in 2004. In several states where there was substantial campaign spending, proponents of same-sex marriage heavily outspent opponents (these cases included Wisconsin in 2006, Arizona in 2006, Colorado in 2006, California in 2008, Florida in 2008, Maine in 2009, North Carolina in 2012, Maine in 2012, Minnesota in 2012, and Washington).


123. Opponents of the same-sex marriage ban in Wisconsin outspent proponents by 6:1. Statistical results are on file with the author.

124. Opponents of the same-sex marriage ban in Arizona outspent proponents by nearly 2:1. Id.


126. Opponents of California’s Prop. 8 outspent proponents by 1.5:1. Id.

127. Opponents of the same-sex marriage ban in Florida outspent proponents by 2.7:1. Id.


This funding reflected a movement to far greater spending on TV advertising after 2004, particularly by supporters of same-sex marriage. Spending over California’s Proposition 8 in 2008—largely a battle of TV ads—topped $100 million. In terms of spending per eligible voter, the 2009 initiative campaign in Maine to veto a same-sex marriage law dwarfed what was spent on Proposition 8 in California ($9.98 per voter in Maine, compared to $3.02 per voter on Proposition 8).

Despite high spending against attempts to ban same-sex marriage in states noted above, proponents of marriage bans generally did not need to spend much to win. A simple ordinary least-squares regression analysis of the relationship between election results from 2004 to 2012 (percent state vote in favor of banning same-sex marriage) and spending reveals an inverse relationship between campaign expenditures and voting. Where more was spent—either in total, by the yes side, or by the no side—a higher proportion of votes were cast in favor of banning same-sex marriage. The inverse association be-
tween yes-side spending and vote support likely reflects endog-
eneous effects associated with the states, rather than yes-side
spending reducing vote share. That is, proponents of banning
same-sex marriage had little reason to spend on television a d-
vertising in heavily conservative states where the ban was sure
to pass (such as Mississippi and Alabama), while they had
much more need to spend in liberal states like Maine, Oregon,
or California, where passage of the marriage bans was less cer-
tain.139

As of January 2013, the issue had appeared on state bal-
lots thirty-nine times (in thirty-one different states).140 Prior
to 2012, thirty-one states had voted on same-sex marriage, and
thirty-two had rejected it.141 Up until 2012, marriage bans were
uniformly approved (or marriage equality rejected), regardless
of the amount of money spent by rival campaigns.142 This pat-
tern changed in 2012 when voters in three states (Maine, Mary-
land, and Washington) approved measures allowing same-sex
marriage, and voters in Minnesota rejected a ban on same-sex
marriage.143 In at least three of these states, supporters of mar-
rriage equality outspent opponents.144

139. For a discussion of endogeneity and campaign spending on ballot
measures, see generally Thomas Stratmann, Is Spending More Potent for or
Against a Proposition? Evidence from Ballot Measures, 50 AM. J. POL. SCI. 788
140. See Same-Sex Marriage and Domestic Partnerships on the Ballot, su-
pra note 121.
141. Id. Arizona rejected a ban on same-sex marriage in 2006, but
approved a ban in 2008. Id.
142. See id.
143. See id.
144. See Darrin Hurwitz, What the Money Gap in the 2012 Marriage Ballot
Measures Means for the Future of LGBT Equality, HUFFINGTON POST (Dec. 3,
2012, 7:13 PM), http://www.huffingtonpost.com/darrin-hurwitz/what-the-
money-gap-in-the-2012-marriage-ballot-measures-means-for-the-future-of-
lgbt-equality_b_2220629.html?utm_hp_ref=email_share (reporting that each
anti-same-sex marriage campaign was significantly outspent by opponents in
2012); Annie Linskey, Last-Minute Checks Keep Same-Sex Marriage Cam-
.com/news/maryland/politics/blog/bal-last-minute-checks-keep-samesex
-marriage-campaign-alive-20121127,0,3476121.story (stating that supporters
of same-sex marriage outraised and outspent opponents of same-sex marriage
by more than two to one).
A. LESBIAN AND GAY RIGHTS AS A THREAT TO THE MAJORITY

From 1998 to 2010, opponents of same-sex marriage may not have needed to spend as much as supporters, in part because public opinion was largely on their side, and in part because of their ability to effectively portray a minority right as a threat to the majority. Campaigns to ban same-sex marriage generated information about a threat (to the heterosexual majority) posed by gays and lesbians, as well as attacks on “activist” courts. Placing questions about rights on the ballot corresponds with campaigns and events that stigmatize the minority group made subject to the debate. A discussion of a minority-rights question during a campaign need not be framed with malevolent language in order to stigmatize the targeted group. Campaigns against a particular right may be framed with benevolent, neutral, or malevolent language. As examples, ballot measures that proposed repealing protections against job discrimination based on sexual orientation were couched in terms of “no special rights.” Likewise, rather than mentioning affirmative action in their titles, initiatives repealing such programs emphasized that they were promoting the equal application of “civil rights.”

Yet the presence of these measures on a state’s ballot generates information about why the initiative is needed—

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145. Gallup public opinion surveys found majorities opposed to “marriages between same-sex couples” from 1996 to 2010. Gallup’s 2011 survey, however, was its first survey since it began tracking the issue to find a majority in support of same-sex marriage. Frank Newport, For First Time, Majority of Americans Favor Legal Gay Marriage, GALLUP (May 20, 2011), http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx.


147. See, e.g., Protecting Traditional Marriage, AM. CENTER FOR LAW & JUST., http://aclj.org/marriage/protecting-traditional-marriage (last visited Apr. 2, 2013) (arguing that “[a]ctivist courts and zealous political leaders are engaging in an aggressive campaign to alter the landscape of marriage”).


150. CHÁVEZ, supra note 87, at 126–27.
information that can contain explicit or implicit anti-minority appeals. Although anti-minority themes may also surround discussions of the same minority-rights question in non-initiative states, direct democracy can act as a vehicle that generates additional information and media attention that expands the scope of conflict over the question—beyond what it would be in states where it was not put to a popular vote. Stephen P. Nicholson, an American politics scholar, has demonstrated that above and beyond the effects of initiative campaign spending and media attention, voters are significantly more aware of ballot measures involving rights and morality questions than they are of other measures. Nicholson notes that ballot questions about morality and rights tap into core values and deeply held beliefs that provide for “easy” issue voting associated with “gut responses.” Surveys also demonstrate that voters were aware of gay-marriage measures when they appeared on their state’s ballot.

An overview of the content of political advertising from direct-democracy campaigns against same-sex marriage illustrates how marriage rights for lesbians and gays were portrayed as a threat. Conservative Christian organizations active in politics—such as Focus on the Family (FOTF) and The Fam-

151. See generally MENDELBERG, supra note 14 (analyzing racially-loaded implicit and explicit communication in the context of campaign strategy).


153. For example, over 90% of California voters reported being aware of Proposition 187 in 1994 (denying benefits to illegal aliens), and 86% were aware of Proposition 209 in 1996 (repealing affirmative action). This is higher than awareness surrounding some of California’s more famous initiatives, including the term limit initiative Proposition 140 in 1992 (67% aware), and Proposition 103, the successful auto insurance initiative of 1988 (57% aware). Stephen P. Nicholson, The Political Environment and Ballot Proposition Awareness, 47 AM. J. POL. SCI. 403, 405–08 (2003).

154. Id. at 407.

155. Carmines & Stimson, supra note 39, at 78.

156. A 2004 Pew national survey found that 42% of respondents said they were aware of initiatives and referendums on their November ballot. In states where gay marriage was on the ballot, “gay marriage” and “gay rights” were the second most common responses to an open-ended follow-up question asking “can you think of any particular issues on the ballot.” Twenty-six percent offered these unprompted responses in those states. Press Release, Pew Research Ctr. for the People & the Press, Democrats, Blacks Less Confident in Accurate Vote Count: Race Tightens Again, Kerry’s Image Improves 9, 26 (Oct. 20, 2004), available at http://www.people-press.org/files/legacy-pdf/229.pdf.
ly Research Council (FRC)—presented the threat of same-sex marriage argument explicitly.\textsuperscript{157} The FRC promoted the idea that same-sex marriage threatened straight relationships because it would “probably undercut the norm of sexual fidelity in marriage,” “undercut the procreative norm long associated with marriage,” and foster “an anti-natalist mindset that fuels population decline.”\textsuperscript{158} FOTF advocated that the “homosexual rights’ ideology” will result “in changing societal mores and values that deeply impact Americans in their day-to-day relationships with family members, neighbors and co-workers.”\textsuperscript{159}

In campaign advertisements, the threat of same-sex marriage was regularly presented as a slippery slope. In 2004, the Republican National Committee sent direct mail to Arkansas voters linking gay marriage to “The Liberal Agenda,” and implied that if same-sex marriages were to occur in Arkansas that the Bible would be banned\textsuperscript{160} (presumably by liberal homosexuals). A TV ad from Oregon’s 2004 campaign in favor of a constitutional amendment to ban same-sex marriage likewise presented the slippery slope, albeit less overtly, by posing the question, “If we don’t protect marriage now, what’s next? Will marriage mean anything in the future?”\textsuperscript{161}

\begin{itemize}
\item \textsuperscript{157} See Glenn Stanton, \textit{How We Dishonor God in Our Sex Lives}, FOCUS ON FAM., http://www.focusonthefamily.com/marriage/sex_and_intimacy/gods_design_for_sex/how_we_dishonor_god_in_our_sex_lives.aspx (last visited Apr. 2, 2013);
\item \textsuperscript{158} Ten Arguments from Social Science Against Same Sex Marriage, FAM. RES. COUNCIL, http://www.frc.org/human-sexuality#homosexuality (last visited Apr. 2, 2013).
\item \textsuperscript{160} Letter from Republican Nat’l Comm. to Arkansas Voters (2004) (on file with author).
\end{itemize}
marriage campaigns, voters have been told via paid advertisements that second-grade children were being taught that boys can marry boys and girls can marry girls, and that elementary-school students were being forced to watch lesbian weddings.

Nearly all advertising in the 2004 through 2012 election cycles avoided explicitly disparaging homosexuality or homosexuals. Moreover, claims in several ads about the dire consequences of same-sex marriage were often supported with references to published social-science research and federal-court decisions. Two themes in these ads are readily identifiable, however, each defining minority rights as a threat to the majority: (1) same-sex marriage was shown to threaten straight people and their children; and (2) same-sex marriage reflected an attack on the majority by special interests and activist judges who could not be trusted.

Rather than expressly attacking homosexuality, viewers were told about dire secondary consequences of same-sex marriage. An ominous 2008 National Organization for Marriage ad warned, “There’s a storm gathering, the clouds are dark and the winds are strong,” with actors claiming that “advocates of same-sex marriage” will take away a young woman’s freedom, forced a California doctor to choose between her faith and her job, and used “government” to “punish” a New Jersey church group. In the same ad an actor playing a Massachusetts parent says that she is “helplessly watching public schools teach my son that gay marriage is okay.” “Some who advocate for


164. See infra notes 168–70 and accompanying text.

165. The National Organization for Marriage was a major funder of the 2008 Yes on Prop. 8 campaign in California, along with Focus on the Family and the Knights of Columbus. QUIST, supra note 136. The National Organization for Marriage was also a major funder of Maine’s 2009 Yes on 1 campaign, as was the Roman Catholic Diocese of Portland. EVILSIZER, supra note 128, at 2–3.

same-sex marriage,” viewers were told, will change how straight people live, and leave them “no choice.”

The threat of same-sex marriage to children is made explicit. The 2012 campaign in favor of Maine’s Initiative Question 2 claimed “social science” proves that “children will pay a severe price - with lifelong consequences - if marriage in Maine is redefined.” Consequences (offered without any causal logic) were said to include children growing up in poverty, increased juvenile delinquency, and “drug use, increased risk of teen pregnancy, higher dropout rates, lower educational attainment, poorer physical and emotional health, etc.”

Voters are exposed to such claims not only via paid advertising, but through opinion pieces published in local newspapers, and through communications from religious officials.

167. Id. Rather than referring to gays or lesbians, beneficiaries of the favorable treatment for gays and lesbians are referred to repeatedly as “advocates.” Perhaps by coincidence, The Advocate is a prominent LGBT publication. See ADVOCATE, http://www.advocate.com/ (last visited Apr. 2, 2013).

168. The Family Research Council, National Organization for Marriage, and various campaigns cite a study by University of Texas sociologist Mark Regnerus, as evidence that children raised by gay parents are worse off than children raised by a married mother and father. Andy Birkey, Gay Marriage Foes Tout Conservative-Backed Parenting Study, HUFFINGTON POST (June 21, 2012, 12:48 PM), http://www.huffingtonpost.com/2012/06/21/gay-marriage-parenting-study_n_1614226.html. The Regnerus study may be problematic, as it compares children from intact, two parent families to children from families that may not have been intact. See generally Mark Regnerus, How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study, 41 SOC. SCI. RES. 752, 752–70 (2012). Dr. Regnerus’ curriculum vitae states he has received $785,000 in research funding from the Witherspoon Institute and the Bradley Foundation, two socially conservative organizations. See Mark Regnerus, Curriculum Vitae 5 (Jan. 2013), available at www.utexas.edu/cola/files/2829874. The National Organization for Marriage is reported to have been co-founded by an individual who also founded Witherspoon and serves on the Bradley Board. See Birkey, supra.


170. Consequences of Redefining Marriage, supra note 169.

171. See, e.g., David Anderson, Reject Referendum 74: Redefining Marriage Threatens Children, Business, Liberties, BELLINGHAM HERALD (Oct. 21, 2012),
But TV ads provide rich illustrations of how the right to marriage is portrayed in paid and unpaid media as a threat. The threat to children played a prominent role in campaigns directed by political strategist Frank Schubert.\textsuperscript{173} The 2009 Maine campaign to repeal a legislatively enacted same-sex marriage statute and California’s 2008 Prop. 8 campaign to nullify a state-court ruling in favor of same-sex marriage featured nearly identical TV ads that stressed that “homosexual marriage” has “everything to do with schools.”\textsuperscript{174} Each ad featured Robb and Robin Wirthlin, a couple from Massachusetts who claimed their second-grade son was being taught that “boys can marry other boys.”\textsuperscript{175} In each ad, the couple claims, “We tried to stop public schools from teaching children about gay marriage, but the court said we had no right to object or pull him out of class.”\textsuperscript{176} The Wirthlins’ claim about the court ruling against them is bolstered with an on-screen citation to \textit{Parker v. Hurley}, a case in which the First Circuit upheld a decision that dismissed the Wirthlins’ challenge to a Massachusetts district’s use of a children’s picture book that features a prince falling in love with a prince.\textsuperscript{177}

\section*{B. judges as a threat to the majority}

Additional TV ads combined the threat to children with an anti-judicial, majoritarian theme. Californians were informed


\textsuperscript{174} Stand for Marriage Me., \textit{supra} note 162; ProtectMarriage.com, \textit{Yes on 8 TV Ad: Everything to Do with Schools, supra} note 162. The Maine ad featured a white woman as a school teacher, while the California ad had a Latina portray the teacher.

\textsuperscript{175} See \textit{supra} note 174.

\textsuperscript{176} See \textit{supra} note 174.

\textsuperscript{177} \textit{Parker v. Hurley}, 514 F.3d 87, 93, 107 (1st Cir. 2008).
that “four judges ignored 4 million voters and imposed same-sex marriage.” In the same ad, Pepperdine University School of Law Professor Richard Peterson told viewers that as a result of the California Supreme Court, acceptance of gay marriage in California was now mandatory, and that people were now being sued over their personal beliefs, with “gay marriage taught in public schools.” A nearly identical TV ad broadcast in Maine told viewers that “special interests got the legislature to approve homosexual marriage, and tried to prevent Mainers from voting. But Question 1 gives us our vote.”

The same Maine ad featured Boston College Law School Professor Scott T. Fitzgibbon, who informed viewers that unless Question 1 passes, there would be a “flood of lawsuits against individuals, small businesses, and religious groups” with “homosexual marriage taught in public schools whether parents like it or not.” A 2010 ad in Minnesota also claimed “special interests” were “pushing judges and DFL politicians to impose gay marriage on Minnesota” and that “most DFL lawmakers don’t want you to have a say.” Another California ad from 2008 stressed that same-sex marriage “was forced on us by San Francisco judges when gay domestic partners already have the same legal rights” and asked viewers to “think about” what same-sex marriage meant to religious freedoms and to children being taught

178. ProtectMarriage.com, Yes on 8 TV Ad: Whether You Like It or Not, YOUTUBE (Sept. 29, 2008), http://www.youtube.com/watch?v=4kKn5LNhNto&feature=relmfu.
179. Id. The screenshot supporting this claim displayed the California State Supreme Court’s August 18, 2008 decisions in North Coast Women’s Care Medical Group, Inc. v. San Diego County Superior Court, a unanimous 2008 California Supreme Court decision finding that doctors must offer fertilization services to lesbians and gays even if doing so poses an incidental conflict with the doctor’s religious beliefs, or find another physician who will do so. N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct., 189 P.3d 959, 970 (Cal. 2008).
180. The screen displayed the “Parker v. Hurley” citation during this claim. ProtectMarriage.com, supra note 178.
181. Stand for Marriage Me., First Maine Yes on 1 Ad, YOUTUBE (Sept. 14, 2009), http://www.youtube.com/watch?v=1U7bs5yHJv4.
182. Id. A citation to “Elane Photography v. Willock (N.M. 2d Jud. Dist. Ct.)” appears on screen during this claim. Id. The New Mexico Court of Appeals upheld that case and ruled the state’s anti-discrimination statute prohibited discrimination in public accommodations such as wedding photography. Elane Photography v. Willock, 284 P.3d 428, 445 (N.M. Ct. App. 2012).
183. A citation to “Parker v. Hurley” appears on screen during this claim. Stand for Marriage Me., supra note 181.
about same-sex marriage in school.\textsuperscript{185} Oregon’s 2004 campaign for a constitutional marriage amendment also featured claims about “activist judges are trying to overrule Oregon law by sanctioning same-sex marriages.”\textsuperscript{186}

Several other ads avoided presenting same-sex marriage as a direct threat to children, but featured gauzy images of smiling straight couples with young children.\textsuperscript{185} In addition to demonstrating what “normal” families should look like and “what is best for children,” these ads also emphasized the threat of the judicial branch.\textsuperscript{188} One such ad from the 2004 Michigan campaign emphasized that the proposed constitutional amendment on marriage was needed to stop “judges from changing what is already the state law” and that judges do not have the right to “redefine marriage for everybody else . . . voting yes lets the people decide.”\textsuperscript{189} A similar 2012 TV ad informed North Carolina viewers that marriage has been one man and one woman, because “it’s what God created to give children a mother and a father.”\textsuperscript{190} The ad then switched to a majoritarian appeal, and without irony, claimed that “by defining marriage in the state constitution, only voters can determine what marriage means.”\textsuperscript{191} In other words, North Carolina voters could define (or change) God’s will, not judges or legislators.

\begin{itemize}
\item \textsuperscript{185} ProtectMarriage.com, Yes on 8 TV Ad: Have You Thought About It?, YOUTUBE (Oct. 29, 2008) http://www.youtube.com/watch?v=3YRQZw6F0o&feature=relmfu.
\item \textsuperscript{187} See, e.g., Minnesota for Marriage, First Minnesota For Marriage TV Ad: Good of Marriage, YOUTUBE (Oct. 1, 2012), http://www.youtube.com/watch?v=5z3QkveDGNk.
\item \textsuperscript{188} See id. (advocating for a marriage amendment so that “only voters can determine the definition of marriage”).
\item \textsuperscript{189} This language is taken from a 2004 Michigan TV ad produced by several religious officials that was reported to have been broadcast by the American Family Association of Michigan. Am. Family Ass’n of Mich., TV Ad for Michigan’s Marriage Protection Amendment (2004), YOUTUBE (Sept. 15, 2012), http://www.youtube.com/watch?v=1p7JCJsQ5Jg.
\item \textsuperscript{190} Vote for Marriage NC, Vote for Marriage NC’s Pro-Amendment TV Commercial, YOUTUBE (Apr. 24, 2012), http://www.youtube.com/watch?v=TPY75mZt6sL.
\item \textsuperscript{191} Id.
\end{itemize}
C. Appeals to Stereotypes in Direct-Democracy Campaigns Against Rights

Contemporary campaigns against marriage rights for lesbian and gay couples lack the explicit hostility directed toward homosexuals that was found from the 1970s to 1990s. As examples, a 1992 Oregon campaign promoting a “no special rights for gays” ballot measure produced video and print material drawing attention to “the gay agenda,” sexual promiscuity, polygamy, pedophilia, and the idea that homosexuality is a matter of choice rather than biology. Oregon’s Measure 9 also featured a ballot title that stated government “must discourage homosexuality,” and the official summary of the measure equated homosexuality with “pedophilia, sadism and masochism” and specified that the state must “assist in setting a standard for Oregon’s youth that recognizes [these behaviors] as abnormal, wrong, unnatural and perverse.” Former Oregon State Supreme Court Justice Hans Linde cited Measure 9 as a particularly invidious application of direct democracy that violated the Federal Constitution’s Guarantee Clause—largely because the measure appeared to be motivated by animus and contained stigmatizing language directed against homosexuals.

During Idaho’s 1994 initiative campaign against antidiscrimination protections, Kelly Walton, founder of the Idaho Citizen’s Alliance (which promoted the initiative) stated that the primary goal of the measure was to “prevent homosexuals from attaining special legal privileges. Goal number two was to prevent the behavior [from] being taught as normal and

194. See Linde, supra note 2, at 40–41 (arguing that since such ballot measures are motivated so thoroughly by passion and prejudice that they violate the concept of republican government promised by the Guarantee Clause). See generally William E. Adams, Jr., Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy, 55 OHIO ST. L.J. 583 (1994) (arguing that the intolerant motives behind anti-gay rights ballot measures justify greater pre-election challenges that would prevent such measures from reaching the ballot).
healthy to our kids in primary and secondary education.” Walton stressed, further, that “many, many homosexuals are recruited at a very young age, low teens, very, very typical. Yes, it’s something that is mostly taught and caught.”

Recent campaigns against same-sex marriage evaluated in this article were largely devoid of the overt, stigmatizing language and explicit animus found in the 1990s. Nonetheless, contemporary claims that same-sex marriage threatened children, schools, and religious values did echo older stereotypes about lesbians and gays seeking to obtain “special rights” in order to use the power of government to impose a “homosexual agenda” and “gay lifestyle” on an unwilling public. Psychologists report that traditional negative anti-gay stereotypes include portraits of gay men as “hypersexual, over visible, heretical and conspiratorial.” Content analysis of conservative evangelical Protestant videos and publications such as Christianity Today showed homosexuality depicted as a behavior that is chosen or taught (rather than biologically determined), with gay men shown as “predators” who “target children” and are plagued with diseases. Contemporary campaign claims that the right for lesbians and gays to marry is equal to teaching about homosexuality in public schools, in particular, dove-tails with enduring stereotypes of gay men as sexual predators who need to “recruit” young people. The claims of threats to children in campaign appeals may be effective, given that perceptions of threats to children can elicit emotional arousal that

195. Harvey Pitman, In Their Own Words: Conversations with Campaign Leaders, in ANTI-GAY RIGHTS, supra note 94, at 78.
196. Id.
197. See supra Part III.A–B (discussing recent campaigns against same-sex marriage).
198. See Douglass, supra note 192, at 69 (finding that 12% of letters to the editor regarding homosexuality that were published by The Idaho Statesman in the mid-1990s contained the theme of the “gay agenda”).
201. See Pitman, supra note 195, at 78 (quoting anti-gay initiative founder Kelly Walton as saying that homosexuality is "something that is mostly taught and caught").
constrains complex reasoning and leaves parents subject to simplistic reasoning and errors in decision making.\footnote{202 See Irving L. Janis & Leon Mann, Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment 45–80 (1977) (discussing the effects of psychological stress on decision making); Herek, supra note 199, at 71 (“Once parents have perceived a threat to their children, however, their level of emotional arousal typically is too high to permit easy assimilation of such complex concepts. Instead, they are prone to overly simplistic thinking, errors of reasoning, and faulty decision-making processes.” (citation omitted)).}

In this way, contemporary campaigns against lesbian and gay rights can be seen as descendants from those of the 1970s. Anita Bryant’s successful 1977 campaign to repeal a Dade County, Florida anti-discrimination ordinance frequently appealed to stereotypes about the threat of gay men as deviant sexual predators.\footnote{203 Herek, supra note 199, at 70.}\footnote{204 Id.} Gregory M. Herek also notes that Bryant named her campaign organization “Save Our Children,” and quotes her as claiming that acceptance of gay teachers “could encourage more homosexuality by inducing pupils into looking upon it as an acceptable life-style” and that “a particularly deviant-minded teacher could sexually molest children.”\footnote{205 See generally Anita Bryant, The Anita Bryant Story: The Survival of Our Nation’s Families and the Threat of Militant Homosexuality (1977) (Bryant’s autobiography detailing her campaign against “militant homosexuality”).} Bryant also warned that “militant homosexuality” posed a severe threat to American families.\footnote{206 See, e.g., Protectmarriage.com, Yes on 8 TV Ad: Truth, supra note 163.} Slippery-slope arguments about same-sex marriage being forced on school children found in contemporary campaigns\footnote{207 See William E. Adams, Is It Animus or a Difference of Opinion? The Problems Caused by the Invidious Intent of Anti-Gay Ballot Measures, 34 Willamette L. Rev. 449, 449 (1998) (quoting Bryant as stating that “if gays are granted rights, next we’ll have to give rights to prostitutes and to people who sleep with St. Bernards”).} echo Bryant circa 1977.

IV. SPILLOVER EFFECTS OF CAMPAIGNS AGAINST MINORITIES

The previous section established that when same-sex marriage and similar gay rights questions are on the ballot, voters are exposed to information that defines gays and lesbians, or the rights of gays and lesbians, as a dangerous threat. In this Part, I consider the effects of direct-democracy campaigns, not in terms of how the results of these ballot measures structure
minority rights and public policy, but rather in terms of how the campaigns affect the behavior and attitudes of voters.

A number of empirical studies report that direct democracy has secondary effects on citizens. These effects are at least partially independent of policies produced by the process, but they result from citizens being exposed to the process of direct democracy itself. Some scholars claim that direct-democracy campaigns make better citizens because the process has “educative effects,” by which voters are regularly asked to cast decisions about policy through direct democracy, and thus make more politically efficacious decisions and are more knowledgeable of political facts. Others note that some studies finding beneficial educative effects of ballot initiatives cannot be replicated, and that by regularly challenging the legitimacy of representative government, direct democracy may undermine trust in government. At minimum, campaigns over issues placed on the ballot lead to more voters reporting being aware of the issue. The presence of an initiative on a state ballot may also condition how voters make choices between candidates by priming them to evaluate rival candidates in

208. See, e.g., DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES 138 (2004) (“[C]itizens living in states with frequent ballot initiatives are more motivated to vote, are most interested in and better informed about politics, and express more confidence in government responsiveness than do citizens living in noninitiative states.”).

209. See id. at 139 (“The educative effects of ballot initiatives on broad levels of political participation, civic engagement, and confidence in government may be as important for American democracy as the initiative’s direct effect on public policy.”).

210. Id.

211. See generally Mark A. Smith, Ballot Initiatives and the Democratic Citizen, 64 J. POL. 894 (2002) (finding that “voters from states that heavily use initiatives show an increased capacity over the long term to correctly answer factual questions about politics”).

212. See Joshua J. Dyck & Edward L. Lascher, Direct Democracy and Political Efficacy Reconsidered, 31 POL. BEHAV. 401, 412 (2009) (challenging empirical studies that concluded that direct democracy was related to internal and external efficacy); see also Daniel Schlozman & Ian Yohai, How Initiatives Don’t Always Make Citizens: Ballot Initiatives in the American States, 1978–2004, 30 POL. BEHAV. 469, 483 (2008) (finding that “grandiose claims about initiatives redrawing the nature of citizenship are overdrawn and, in some instances, wrong”).


terms of the initiative issue the voter is also evaluating. Voters in states where same-sex marriage was on the ballot in 2004 were significantly more likely to claim that gay marriage was a very important issue when choosing between George W. Bush and John Kerry than were voters in states where marriage was not on the ballot.

Candidates, for their part, sponsor ballot initiative not only to shape policy, but to send cues to voters about the candidate’s policy positions and ideology. Candidates and party officials have also been shown to view ballot initiatives as an indirect means to increase turnout for a preferred candidate, yet studies have not determined that placing an issue (such as gay marriage) on a state’s ballot increased turnout to the benefit of a particular candidate who shared the majority’s position on the issue. There is, however, substantial evidence that ballot measures increase voter turnout in aggregate at the state level, particularly in “midterm” elections that lack the mobilizing forces of presidential contests.

The potential turnout, priming, and “educative” effects of direct-democracy campaigns are probably not exclusive to campaigns associated with any particular type of ballot issue. Turnout effects have been found to be associated with the

215. See Stephen P. Nicholson, Voting the Agenda: Candidates, Elections, and Ballot Propositions 15 (2005) (“If an issue is on the agenda, even if only discussed in one type of race, its effects will be widespread, shaping voters’ candidate judgments up and down the ballot.”).

216. See Donovan et al., supra note 34, at 1298 (“The marriage issue had a stronger effect on support for Bush in states where marriage measures were on the ballot.”).


218. Id. at 738; see also Smith & Tolbert, supra note 208, at 118. See generally Elizabeth Garrett, Hybrid Democracy, 73 Geo. Wash. L. Rev. 1096 (2005) (arguing that candidates use initiatives to affect turnout in elections and to highlight campaign issues that they believe will help them win).

219. See Daniel A. Smith et al., Same-Sex Marriage Ballot Measures and the 2004 Presidential Election, 38 St. & Loc. Gov’t Rev. 78, 88 (finding that turnout in Ohio and Michigan increased in 2004 “irrespective of support for the anti-gay marriage amendments”).

220. See Smith & Tolbert, supra note 208, at 37 (“Midterm elections are low-information elections with very few sources of mobilization, thus making the electorate more sensitive to those sources of mobilization that exist, such as ballot measures.”); Caroline J. Tolbert, Daniel C. Bowen & Todd Donovan, Initiative Campaigns: Direct Democracy and Voter Mobilization, 37 Am. Pol. Res. 155, 181 (2009) (“[T]he research provides solid evidence of a turnout effect at the individual level in both presidential and midterm elections.”).
number of measures on a state’s ballot, with levels of campaign spending on ballot measures, and with the salience of the issue (measured in terms of media attention), but not in terms of issue type. Initiatives on nuclear freeze, same-sex marriage, abortion, and the environment have been found to prime voter considerations about candidates. The empirical literature does not establish that direct-democracy campaigns against minorities have particularly distinctive turnout or priming effects. Nonetheless, the sum of this literature suggests strongly that by having same-sex marriage measures on the ballot, turnout levels may rise, and more voters may be considering the marriage issue when voting on candidates.

Yet given the unique context of direct-democracy campaigns against minorities, it would seem that some of the other “educative effects” of direct-democracy process would operate differently here. As noted above, direct-democracy campaigns against minority rights are unique in that they highlight and advertise the threats associated with the targeted minority and the threat (to the majority) of extending rights to the targeted minority. Joshua J. Dyck demonstrates that, whatever positive citizenship effects of direct democracy exist broadly for the majority of citizens, the process creates conflict and decreases social trust where the majority perceives a greater threat of a

221. See Matt Childers & Mike Binder, Engaged by the Initiative? How the Use of Citizen Initiatives Increases Voter Turnout, 65 POL. RES. Q. 93, 93 (2012) (“As the number of initiatives on a ballot rises during midterm elections, voter turnout does as well, but these effects do so with diminishing marginal returns as the number of initiatives increases.”).
222. Tolbert, Bowen and Donovan, supra note 220, at 178 fig.3.
223. See generally Mark A. Smith, The Contingent Effects of Ballot Initiatives and Candidate Races on Turnout, 45 AM. J. POL. SCI. 700 (2001) (analyzing the potential of campaigns for ballot measures and elected offices to draw to the polls citizens who otherwise would not vote).
224. NICHOLSON, supra note 215, at 61–90.
225. Donovan et al., supra note 34, at 1229.
226. NICHOLSON, supra note 215, at 52 tbl.4.4.
227. See, e.g., Smith et al., supra note 219, at 84 (“[C]ounties with higher levels of support for the measures banning same-sex marriage appear to have had greater support for Bush in 2004, though not higher turnout, compared with the 2000 election.”).
228. See, e.g., Donovan et al., supra note 34, at 1227–28 (“Our results demonstrate that state same-sex marriage campaigns encouraged some voters . . . to be more likely to see gay marriage as an important issue. That we find this relationship toward the end of the campaign, but not early in the campaign, suggests strongly that the marriage measures were the mechanism that primed some voters to assess candidates in terms of the gay marriage issue.”).
minority. He demonstrates further evidence of the minority-threat effect by finding that evangelical Christians who lived near larger gay populations were more likely to support state marriage bans in 2004 than other evangelical Christians.

Beyond stimulating awareness of, and interest in an issue, messages associated with ballot measures targeting minority rights can trigger perceptions (among some people) that the group targeted by the ballot question presents some sort of threat. These messages can also activate or perpetuate negative stereotypes and predispositions about the targeted group. As a result, popular votes on rights may increase popular animosity toward members of the group whose rights are in question. Derrick Bell, Jr. has argued that the emotionally charged atmosphere surrounding direct-democracy campaigns against minorities “can easily reduce the care with which the voters consider the matters submitted to them,” and that such campaigns reduce voter tolerance.

Research that I have conducted with Caroline Tolbert tested hypotheses about how exposure to direct-democracy campaigns against same-sex marriage in 2004 made some people less accepting of homosexuals. We found a number of reasons to expect that exposure to and receptivity to information about the threat of same-sex marriage would be more prevalent among people who attended religious services frequently in states where marriage was on the ballot.

229. Joshua J. Dyck, Racial Threat, Direct Legislation, and Social Trust: Taking Tyranny Seriously in Studies of the Ballot Initiative, 65 Pol. Res. Q. 615, 618 (2012) (finding an interaction between the proportion of an area that is non-white, and initiative use that erodes trust, resulting in lower trust when initiatives are used in a context of greater racial/ethnic diversity).


231. See infra Part IV.A (discussing how direct-democracy campaigns change perceptions of targeted minority groups).


234. See id., at 10–11 (discussing the issues of exposure to and receptivity of same-sex marriage information).
prevalent in states where marriage was not being voted on. However, people were likely to have experienced a different information environment where marriage was a ballot question. In these states church directories were used to target phone calls about the gay marriage issue to religious voters. In initiative states, groups organized to promote or oppose marriage bans that reached the ballot. Newspapers also directed more news and editorial content to the marriage question closer to election-day in states where it was on the 2004 ballot. Mail with anti-gay-marriage themes was targeted toward religious conservatives and church sermons were used to promote support for the ballot measures. Thus, despite low levels of campaign spending on same-sex marriage in 2004, many voters, particularly those who both resided and attended religious services in states where marriage was on the ballot and, were exposed to information about same-sex marriage (and by extension, lesbians and gays) as a threat.

As for receptivity to negative information about gays and lesbians, disapproval of homosexuality has been found to be greater among people who attended religious services regularly and who believed that religion is a very important part of life. Given this, we tested if frequent attendance at religious ser-


236. See Donovan & Tolbert, supra note 233, at 10 (discussing the exposure people received, such as church bulletins or telephone calls); see also Donovan et al., supra note 34, at 1220 (discussing the frequency that gay marriage was mentioned in newspapers in states where gay marriage was on the ballot); Smith, supra note 223, at 701 (discussing the level of awareness of issues about propositions, and relating it to news coverage and informal discussions among citizens, as well as campaigns).


238. See supra Part III (discussing groups that campaigned for and against same-sex marriage).

239. Donovan et al., supra note 34, at 1220.

240. Campbell & Monson, supra note 119.

241. See Donovan & Tolbert, supra note 233, at 17 (“Having a popular vote on the right to marriage corresponded with a significantly increased likelihood that a particular sub-set of respondents rated gays and lesbians at the lowest end of the thermometer scale—those who we assume may have been more likely to be exposed to and receptive to themes that portrayed marriage among same-sex couples as a threat to heterosexuals.”).

vices by those who were religiously inclined corresponded with a person coming to perceive that gays and lesbians constituted a threat.\textsuperscript{243} We tested our hypotheses using public-opinion data collected in period American National Election Study (ANES) surveys.\textsuperscript{244} ANES surveys asked respondents to rate various groups (including gays and lesbians) on a 0 to 100 feeling-thermometer scale, with ratings above 50 “meaning you feel favorable and warm” toward the group and ratings below 50 “meaning you feel unfavorable and cool” toward the group.\textsuperscript{245} Although not a direct measure of threat perception, we suggest the thermometer measure serves as a useful surrogate of threat perceptions.\textsuperscript{246} At minimum, we assumed that people who rated gays and lesbians lower on the scale after the campaign against same-sex marriage had grown less sympathetic toward gays and lesbians.\textsuperscript{247} A rare panel study provided us with a person’s rating of gays and lesbians in 2002, and with the same person’s rating of gays and lesbians immediately after the 2004 election.\textsuperscript{248} This provided an opportunity to test if an individual’s assessment of gays and lesbians was lower in states where same—sex marriage was on the ballot, while controlling for the respondent’s assessment offered earlier. We tested if rating gays and lesbians very low on the scale (at 10 or lower) corresponded with living in a state where marriage was on the ballot.\textsuperscript{249}

Our results suggested that there was a significant relationship between religiosity and increased animosity toward lesbians and gays in 2004, but that this effect was limited to religious individuals living in states where a same-sex marriage ban was on the ballot.\textsuperscript{250} As Tolbert and I explained:

Put differently, popular votes on marriage did not correspond with people in those states, on average, growing cooler toward gays and lesbians. Having a popular vote on the right to marriage corresponded

\textsuperscript{243} Donovan & Tolbert, supra note 233, at 13–14.
\textsuperscript{244} Id. at 11.
\textsuperscript{245} In 2004, the mean rating for gays and lesbians was 44.9, down from 45.2 in 2002. In 2002 14.5% of respondents rated gays and lesbians at 10 or lower. In 2004, 17.2% of respondents rated gays and lesbians at 10 or lower. This compares to mean ratings in 2004 of 65.4 for Hispanics (1.0% at 10 or lower), 66.2% for Asians (1.4% at 10 or lower), 66.5 for Jews (0.7% at 10 or lower) and 68.7% for Blacks (0.7% at 10 or lower). Id. at 23.
\textsuperscript{246} Id. at 12–13.
\textsuperscript{247} Id. at 15, 25.
\textsuperscript{248} Id. at 11–12.
\textsuperscript{249} Id. at 9–10.
\textsuperscript{250} Id. at 17, 25.
with a significantly increased likelihood that a particular sub-set of respondents rated gays and lesbians at the lowest end of the thermometer scale—[religiously inclined people] who we assume may have been more likely to be exposed to and receptive to themes that portrayed marriage among same-sex couples as a threat to heterosexuals.\textsuperscript{251}

This increased animosity reflects a potential spillover effect of direct-democracy campaigns against minorities that is quite contrary to the positive effects usually portrayed by the \textquotedblleft educative effects\textquotedblright literature on direct democracy.\textsuperscript{252} Despite the fact that contemporary campaigns against same-sex marriage avoid overt, stigmatizing language about gays and lesbians, these campaigns (at least in 2004) appear to have not only mobilized opinion against same-sex marriage, but also against gays and lesbians themselves.\textsuperscript{253}

It is important to put this result in context. What, for example, is the substantive meaning of finding that some people in states where marriage was voted on became more likely to rate gays and lesbians at the lowest end of a feeling-thermometer scale after a direct democracy campaign? Whatever the meaning of the change in attitudes, this decreased acceptance of (or growth in animosity toward) gays and lesbians was concentrated among people who may have already been predisposed to be less acceptant of gays and lesbians.\textsuperscript{254} Any effects the 2004 campaigns had on moving opinions against gays and lesbians, moreover, may have been short lived. Large majorities opposed same-sex marriage in 2004,\textsuperscript{255} but national opinion polls conducted after 2010 documented majority acceptance of same-sex unions.\textsuperscript{256} Where in 2004 campaigns could have sold the idea that gays and lesbians and same-sex unions were a threat, this appeal may have been less effective after 2010.\textsuperscript{257} This begs the question, however, of what the short-term effects of these campaigns may have been. For example, campaigns against gay and lesbian rights may, by heightening

\begin{itemize}
  \item \textsuperscript{251} Id. at 17.
  \item \textsuperscript{252} Id. at 20.
  \item \textsuperscript{253} Id. at 19.
  \item \textsuperscript{254} Id. at 17.
  \item \textsuperscript{256} For a summary of poll trends, see Nate Silver, \textit{Gay Marriage Opponents Now in Minority}, N.Y. TIMES FIVETHIRTYEIGHT BLOG (Apr. 20, 2011, 11:18 AM), \url{http://fivethirtyeight.blogs.nytimes.com/2011/04/20/gay-marriage-opponents-now-in-minority/}.
  \item \textsuperscript{257} Donovan & Tolbert, supra note 233, at 21.
\end{itemize}
animosity toward gays and lesbians among a small sub set of
the population, increase hate crimes against gay men and les-
bians. Campaigns against same-sex marriage may have addi-
tional spillover effects by highlighting unpopular court deci-
sions. If voters respond to campaign attacks on courts, popular
regard for the judiciary may suffer as a result. 258

V. THE END OF MINORITY THREAT?

Direct-democracy campaigns against minority rights are
unique in that they often emerge as a political backlash to mi-
nority rights that are portrayed as a threat to the majority. 259
Unlike candidate races, and unlike other direct-democracy con-
tests, voter decisions on such matters can be based on affect (or
hostility) toward the group targeted by the ballot proposal.
Backlash may not be limited to the minority group that poses a
threat to the majority. 260 Backlash may also include a reaction
against the democratic institutions that protect minorities and
that are designed to mute the force of majority passion and
opinion. Direct-democracy campaigns against the threat of mi-
nority rights may also have unique spillover effects. In the case
of same-sex marriage rights, state-level anti-marriage cam-
paigns that highlighted the threat of extending marriage rights
to lesbians and gays corresponded with a subset of voters in
those states growing less sympathetic to lesbians and gays. 261

But do the campaigns against same-sex marriage inform
us about future campaigns against minority rights? It may very
well be that the cumulative effect of decades of court decisions
overturning initiatives and referendums that restricted minori-
ty rights—decisions blocking ballot measures that targeted pri-
ivate religious schools, nullifying measures that allowed race-
based housing discrimination, decisions that banned voter-
approved school segregation, and decisions that overturned

258. There is evidence of a link between attitudes about same-sex marriage
and attitudes about the courts. Opponents of same-sex marriage in Washin-
gton state were found to be significantly more likely to support popular election
of state supreme court judges than supporters of same-sex marriage (respond-
ents were asked if they favored having a court appointed by a merit system or
a court elected directly by voters). Todd Donovan & Shaun Bowler, Public Atti-
itudes About Reforming Judicial Elections 24 (unpublished manuscript) (on file
with author) (presented at the Pacific Northwest Political Science Association
259. See supra Part II.
260. See supra Part II.
261. See supra Part IV.A.
measures prohibiting government from protecting gays and lesbians from job discrimination—have shut the door on any future direct-democracy campaigns against minorities and their rights.

One could argue that we may see the end of direct-democracy campaigns against gay and lesbian rights. Popular attitudes about gays and lesbians have been changing, becoming more tolerant since the 1970s. Acceptance of homosexuality, support for civil unions, and popular support for full access to marriage all increased dramatically since the 1990s. Moreover, immediately after North Carolina voters amended their state’s constitution to ban gay marriage in May of 2012, President Barack Obama used the institution’s “bully pulpit” to speak out in support of equal rights in marriage. President Obama’s act could have had the effect of moving opinion even further toward acceptance of LBGT rights, or opinion may have already moved. In 2012, voters in three states extended the right to marry to same-sex couples and voters in a fourth state rejected a ban on same-sex marriage. The Supreme Court announced that it would determine the constitutionality of California’s Prop. 8 and the federal Defense of Marriage Act in 2013. The court could end direct legislation on same-sex marriage via the Equal Protection Clause, the Due Process


Clause, or the Full Faith and Credit Clause\textsuperscript{269} just as other courts ended earlier cycles of direct-democracy campaigns against minorities.\textsuperscript{270} We might conclude from all of this that direct-democracy campaigns targeting the rights of lesbians and gays could become a thing of the past. After all, majority opinion cannot be mobilized against a minority if doing so is unconstitutional, or if the majority is no longer apprehensive about the minority.

Even if, hypothetically, majority opinion or the courts did become fully acceptant of gay rights, direct-democracy campaigns against other minorities would not necessarily cease. For this to be the case, we would need to assume that lesbians and gays were, in effect, the “last minority.” Such an assumption would be challenging, given the history of democracy in America. Since the adoption of direct democracy, there have regularly been minorities whose rights have been decided on state ballots by a majority of voters. The list includes (but is by no means limited to) voting rights for blacks repealed by a white majority,\textsuperscript{271} Catholics targeted by the Ku Klux Klan,\textsuperscript{272} Catholics and other immigrants targeted by prohibitionists,\textsuperscript{273} Japanese immigrants targeted by white prejudice,\textsuperscript{274} Communists targeted by the California Republican Party,\textsuperscript{275} African


\textsuperscript{270} See, e.g., Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (applying the Due Process Clause to overrule a citizens’ initiative aimed at eliminating Catholic schools).

\textsuperscript{271} CRONIN, supra note 68, at 92–93.


\textsuperscript{275} JONATHAN BELL, CALIFORNIA CRUCIBLE: THE FORGING OF MODERN AMERICAN LIBERALISM 171 (2012).
Americans targeted by opponents of desegregation,\textsuperscript{276} Latino immigrants targeted by the California Republican Party,\textsuperscript{277} and AIDS victims targeted by Lynden LaRouche.\textsuperscript{278} 

Making this generalization—taking the proposition that gays and lesbians could become a minority whose rights are no longer to be decided by direct democracy to mean that all minority-rights questions will no longer be decided by direct democracy—would also require that we assume political entrepreneurs will no longer find reason to mobilize majority opinion against another threatening minority in the future. Historic precedent and contemporary political practice suggests that these assumptions are wrong.

As an example, Mitt Romney, the 2012 Republican presidential nominee, voiced stereotypes about his opponent that played to popular fears and prejudices about Muslims, a minority that most Americans perceived as being a threat to American culture.\textsuperscript{279} Romney’s language was directed at the president, an African American with the middle name Hussein and the family name Obama.\textsuperscript{280} Defining himself as something distinctly opposite of (and by implication better than) President Barack Obama, Romney noted publicly that he required no birth certificate to demonstrate that he was American.\textsuperscript{281} Further, Romney falsely claimed, repeatedly, that the African-American president he previously mocked for not being Ameri-

\textsuperscript{276} Bell, \textit{supra} note 3, at 15–22.


\textsuperscript{278} Sponsored by a Lyndon LaRouche organization, California Proposition 64 of 1986 would have prevented HIV-positive individuals from attending or teaching in public schools. \textit{See} Charles Petit, \textit{California to Vote on AIDS Proposition}, SCIENCE, Oct. 17, 1986, at 277.

\textsuperscript{279} Erik Nisbet et al., \textit{The “BIN LADEN” Effect: How American Public Opinion About Muslim Americans Shifted in the Wake of Osama Bin Laden’s Death} 3 (2011), \textit{available at} http://www.eriknisbet.com/files/binladen_report.pdf. A random sample survey of Americans found most people disagreed that Muslims were trustworthy, most disagreed Muslims were peaceful, most supported a ban on construction of new Mosques, most agreed Muslims “undermine American culture” and most agree that American Muslims should “register their whereabouts with the U.S. government.” \textit{Id.} at 3–4.


can, (and assumed to be Muslim by many Republicans) “sympathize[d] with those [radical Islamists] who waged the attacks” on the American embassies in Benghazi and Cairo. Romney’s claim that Obama sympathized with Islamist attackers was quickly echoed on Twitter by the Republican National Party chair.

Not long before Romney was promoting the idea that President Obama sympathized with violent, extremist Muslims, county officials in suburban Chicago were being forced to reconsider a zoning decision that would have permitted construction of a mosque. Facing similar opposition—including public protests, a local Republican congressional candidate linking construction of the mosque to Hamas and Jihad, and lawsuits by opponents—Muslims in Rutherford County, Tennessee, were unable to open a place of worship until a federal judge ordered that it could operate. An attempt to site a mosque in Brentwood, Tennessee, was also defeated by popular opposition. A proposal for a community center and mosque on Park Place in Manhattan faced public opposition fomented by a group named Stop Islamization of America. After President Obama expressed support for “the right to build a place of worship and a community center on private property in lower Manhattan,”


285. See Hunt, supra note 283.


288. Bob Smietana, Brentwood Mosque Not Alone in Defeat: Plans for Places of Worship Face Growing Resistance, TENNESSEAN (May 23, 2010), http://www.tennessean.com/article/20100523/NEWS06/10923001. Opposition was led by a United Methodist Church member who claimed that “not enough people understand the political doctrine of Islam.” Id.

another Republican presidential candidate—Newt Gingrich—accused the President of “pandering to radical Islam.” Survey data suggest Gingrich’s position was closer to the opinions of most Americans than the President’s position.

Land-use decisions affecting the rights of Muslims to construct places of worship have not (yet) reached ballots in American states and communities, but the discussion above illustrates that gays and lesbians are certainly not the last unpopular minority in America whose rights may be determined by the force of popular opinion. Immigrants, smokers, accused criminals, and convicted felons might be added to the list of unpopular minorities whose rights have been and may continue to be decided by voters. The political conditions surrounding Muslims in America are similar to conditions associated with other groups that have been made the subjects of popular votes in past decades. As with gays and lesbians in previous decades, a majority of Americans view Muslims as a threat, and prominent, mainstream politicians have sought political advantage by exploiting negative stereotypes associated with the group. Switzerland—the only other nation that makes regular use of direct democracy—has already experienced a referendum on the construction of minarets, an architectural feature of Islamic mosques. Although only four minarets were ever constructed in that country, proponents of the August 2009 national referendum claimed minarets had no religious value, but, rather, symbolized Islamic intolerance and

291. CNN & OPINION RESEARCH CORP., AUG. 6–10 POLL (2010), available at http://i2.cdn.turner.com/cnn/2010/images/08/11/rel11a1a.pdf. Sixty-eight percent reported being opposed to the “plan to build a mosque two blocks from the site in New York City where the World Trade Center used to stand.” Id. at 3. Eighty-two percent of Republicans were opposed. Id. at 8.
292. See Erwin Chemerinsky, Challenging Direct Democracy, 2007 MICH. ST. L. REV. 293, 297 (arguing that direct democracy is used to limit minority rights).
293. See supra note 279.
294. See, e.g., Sabrina Siddiqui, Romney’s Israel-Palestine Comments Are Latest Chapter in Candidate’s Struggle with Muslims, HUFFINGTON POST (Sept. 20, 2012, 1:19 PM), http://www. huffingtonpost.com/2012/09/18/romney-israel-palestine_n_1891868.html (describing Romney’s increasingly anti-Muslim rhetoric during the course of his political career).
the “Islamisation” of Swiss society. Swiss voters approved the initiative constitutional amendment with fifty-seven percent support.

CONCLUSION

Minority rights and popular opinion are often in conflict in democratic political systems. Majority opinion may at times trump the interests of minorities under any democratic institution. Legislatures, executives, and even courts can channel popular sentiments into policies that restrict minority rights. In this Article, I have argued that there is a unique relationship between majority opinion and minority rights in direct democracy. It is unlike other democratic institutions not simply because choices about rights are made directly by a majority of voters, but because the context of choice is so heavily conditioned by affect toward members of the group and perceptions that the minority presents a threat to the majority. Direct democracy expands the conflict over questions of rights. When minority rights are put to a popular vote, campaigns portray the minority as a threat and thus create spillover effects, with the members of the minority stigmatized in ways that would not have occurred were it not for the campaign against their rights.

Campaigns against the rights of gays and lesbians are but one of many examples of direct democracy expanding conflicts over minority rights. Recurring conflicts associated with minority rights being decided by a popular vote may be seen by some as a sign of robust democratic politics. Others may find direct democracy’s expansion of conflicts over rights a recipe for demagoguery, and a process that is inconsistent with models of democracy that aim to protect minority interests. States need not abandon the popular initiative process to remedy this. A number of state constitutions place substantive subject restrictions on popular initiatives. Massachusetts does not allow initiatives on the subject of religion or the courts. Alaska prohibits measures affecting the judiciary.

296. Haig Simonian, Mosque Vote Threatens to Isolate Swiss, FIN. TIMES (Nov. 23, 2009), http://www.ft.com/intl/cms/s/0/e8e36bfu-d85f-11de-b63a-00144feabde0.html#axzz26xR3NGAI.
297. Id.
298. See supra Part II.
300. ALASKA CONST. art. XI, § 7.
initiatives to change the state’s Bill of Rights.\textsuperscript{301} Other states prohibit measures on various fiscal questions.\textsuperscript{302} Unless limits are placed on how initiatives and referendums are used to define minority rights, political campaigns targeting minority rights—with their associated spillover effects—will remain part of the American political system.

\textsuperscript{301} \textit{Miss. Const.} art. XV, § 273, cl. 5. This could also preclude popular votes that would expand rights.

\textsuperscript{302} \textit{See, e.g.}, \textit{Ariz. Const.} art. IX, § 23; \textit{Mo. Const.} art. II, § 51; \textit{Nev. Const.} art. XIX § 6.